IN THE

Supreme Court of the United States

October Term, 1954.

No. 153.

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

against

DREXEL AND COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Petition by Respondent for Rehearing.

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SECURITIES AND EXCHANGE COMMISSION,

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DREXEL AND COMPANY,

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PETITION BY RESPONDENT FOR REHEARING.

Drexel & Co., Respondent, respectfully petitions the Court for a rehearing of the Court's decision dated February 28, 1955 in the above entitled proceeding.

Rehearing and a modification of the Court's opinion are required because Section 12(d) of the Public Utility Holding Company Act of 1935 (the "Act"), relied on by the Court, is not and could not be applicable to the instant proceeding. Section 12(d) applies only to the "sale" by a registered holding company of a "security which it owns of any public utility company". It has no application to the "sale" in the instant case of the stock of Electric Light & Power Corporation ("Electric"), which has never been a "public utility company" as that term is defined in the Act.

No reservation of jurisdiction by the Commission could have reached that part of Drexel's fee properly allocable to services not covered by the Application-Declaration of Electric Bond & Share Company ("Bond & Share").

These points are central to the decisive issue of the extent of the jurisdiction of the Securities and Exchange Commission (the "Commission") over the Drexel fee herein because of the broad injunction entered by the District Court below.

The opinion of the Supreme Court rests on Section 10 and Section 12(d) of the Act (see pp. 2-4, including footnote on p. 2).

Section 12(d), however, was not and could not have been applicable to any of the transactions covered by Bond & Share's Application-Declaration (R. 330, 334). Hence, even though, as the Court found, the Commission's order (R. 36a, 39a) did reserve all available jurisdiction it had over the Drexel fee, the Commission could not exercise jurisdiction which it did not have—and it never had any jurisdiction over any part of the Drexel fee on the basis of Section 12(d).

Section 12(d) provides as follows:

> "(d) It shall be unlawful for any registered holding company . . . to sell any security which it owns *of any public-utility company*, or any utility assets, in contravention of such rules and regulations or orders regarding the consideration to be received for such sale, maintenance of competitive conditions, fees and commissions, accounts, disclosure of interest, and similar matters as the Commission deems necessary or appropriate in the public interest. . . ." [Italics supplied].

A "public-utility company" is defined in Section 2(a)(5) of the Act as "an electric utility company or a gas utility company".

"Electric and gas utility" companies are defined in Sections 2(a)(3) and 2(a)(4) of the Act as follows:

> "'Electric utility company' means any company which owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale. . . ."
>
> "'Gas utility company' means any company which owns or operates facilities used for the distribution at retail . . . of natural or manufactured gas for heat, light, or power. * * *"

Electric was not and never has been an operating gas or electric utility company. From its inception to its dissolution it was always solely and exclusively a holding company.[1]

Hence, any "sale" by Bond & Share of Electric stock was not the sale of a security of a "public-utility company" as that term is defined in the Act and could not have been subject to Section 12(d).

In fact the record shows that no application was ever made or any action taken under Section 12(d) in the instant proceeding. The Application-Declaration filed by Bond & Share quite properly refers (R. 334) only to Sections 12(c) and 12(f) and not to Section 12(d). Unlike Section 12(d), relied on by the Court, neither Section 12(c) nor Section 12(f) contains any reference to fees whatsoever. The order of the Commission approving the Plan and the Application-Declaration (R. 36a-41a) does not refer to any particular sections of the Act.[2]

While the Commission at page 20 of its brief on appeal to this Court discussed Section 12(d) of the Act, it did so only as a theoretical instance in which it *would* have jurisdiction over fees in appropriate cases where that section is

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1. This has never been disputed. See H. C. A. Rel. No. 8889 (March 2, 1949) requiring certain amendments in Electric's Plan.

2. The opinion (R. 212a) and order (R. 267a) of the Commission on the fee application refer only to Section 11(e); no mention is made of either Section 10 or Section 12.

applicable. It does not state there or in its statement of facts (p. 8) that any application was made by Bond & Share, or any action taken, under Section 12(d) in the instant case, and it could not so state in view of the Act and the record.

In the instant case, on the basis of the Court's holding that the jurisdiction was reserved by the Commission, only Section 10 could be properly held to have afforded the Commission jurisdiction over any part of the Drexel fee.

Thus, under Section 10 the Court held that the Commission had jurisdiction over Bond & Share's acquisition of new securities distributed pursuant to the Electric plan, since that section applies to the "acquisition" by a registered holding company of *any* securities, whether or not issued by a public utility company.

In conferring fee jurisdiction, Section 10(b) provides in relevant part:

> "If the requirements of subsection (f) are satisfied, the Commission shall approve the acquisition unless the Commission finds that—
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> • • •
>
> "(2) in case of the acquisition of securities or utility assets, the consideration, including all fees, commissions, and other remuneration, to whomsoever paid, to be given, directly or indirectly, in connection with such acquisition is not reasonable or does not bear a fair relation to the sums invested in or the earning capacity of the utility assets to be acquired or the utility assets underlying the securities to be acquired; . . ."

It should be noted that Section 10(b)(2) relates only to fees incurred "in connection with" an "acquisition". It does not have the enlarging reference to fees paid in connection with "the transactions incident thereto" which was contained in the Commission's order and on which the Court relied in its opinion. Hence fees incurred in connection either with the "sale" of the Electric securities or

with any transaction other than the "acquisition" may not properly be brought within Section 10(b)(2).[3]

Thus, viewing Bond & Share's transactions in the manner required by the statute and the Courts' decision as to reservation of jurisdiction, *only one transaction*—Bond & Share's "acquisition"—*is under a provision of the Act conferring fee jurisdiction on the Commission.*

Except for this "acquisition" by Bond & Share of the stock of Middle South Utilities, Inc. and United Gas Corporation pursuant to Electric's Section 11(e) Plan, therefore, Drexel should be able to receive from Bond & Share, without Commission approval, such part of its fee as would be fairly applicable to other matters such as Bond & Share's "sale" of Electric securities, the retirement of Electric preferred stock, and financial and economic studies not in connection with any transaction consummated under the Plan (R. 61a-117a). This result is compelled by the minutely detailed Act which is clearly drafted to deal separately with, and to confer on the Commission separate and disparate jurisdiction over, limited aspects of affairs which in a business sense might be, but in the statutory sense cannot be, regarded as single transactions.

Accordingly, the judgment of this Court and, ultimately, the injunction entered by the District Court, assuming it could be properly entered at all in this proceeding, must be modified to reflect the limited scope of the Commission's statutory jurisdiction.

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3. In addition to Bond & Share's "sale" of Electric securities and "acquisition" of new securities distributed on the dissolution of Electric, Bond & Share's Application-Declaration covered a third transaction, the settlement of intra-system claims. The Court held this settlement was incidental to the "sale" under Section 12(d) and the "acquisition" under Section 10. Section 12(d) not being applicable, the settlement of the claims can scarcely be regarded as sufficiently incidental to the "acquisition" alone to bring it under Section 10. In any event, however, so far as Drexel is concerned, the question is moot for it "never had anything whatever to do" with the settlement of claims (R. 121a).

Drexel is entitled to this relief in view of the nature of the injunction issued by the District Court. In its order the District Court (R. 291a-292a) enjoined Bond & Share and Drexel from "paying or receiving any fees or expenses approval of which was denied in said Orders of the Commission . . ." The Commission order as to the Drexel fee (R. 269a-270a) denied the application to the extent it exceeded the $50,000 allowed. Thus, Bond & Share was enjoined by the District Court from paying, and Drexel was enjoined from receiving, more than $50,000 for all of the services covered by Drexel's application. That application (R. 59a) included services which lie clearly beyond the scope of Section 10.

Hence, unless it is made clear that only a limited part of the Drexel fee is subject to the jurisdiction of the Commission, Bond & Share will be prevented from paying to Drexel that part of the fee not subject to the jurisdiction of the Commission and which Drexel is entitled to receive.

Moreover, the District Court could not properly enter an injunction against Drexel and Bond & Share in this proceeding on the basis of this Court's decision that Commission jurisdiction rests on Sections 10 and 12(d), which, unlike Section 11(e), do not contain a special provision for Court enforcement. Such an injunction requires an independent suit under Section 18(f) of the Act, which authorizes the Commission to apply to a Court to enjoin any threatened violation of the Act (including Sections 10 and 12(d)). This would raise issues which could not properly be and were not raised before the District Court in this case, since that Court was enforcing a reorganization plan under Section 11(e) and the proceeding was so regarded by all parties. This is apparent from the Commission's notice of hearing (HCA Rel. No. 9703, March 7, 1950), opinion (R. 212a), order (R. 267a), and supplemental application to the District Court below (R. 270), none of which contains any indication that the Commission thought it was

acting pursuant to powers under Section 10 and Section 12 of the Act reserved upon the approval of Bond & Share's Application-Declaration. On the contrary, all of these pronouncements refer only to Section 11(e) and describe or contemplate action only under that Section.

Such an 11(e) plan enforcement proceeding is essentially a review of Commission action on the record before the Commission. The findings of the Commission are final if supported by substantial evidence and the Court is deprived of the discretion which it would have in a proceeding under Section 18(f). Compare *SEC v. Central Illinois Securities Corp.*, 338 U. S. 96 (1949) with *Electric Bond & Share Co. v. SEC*, 303 U. S. 419 (1938) and *The Hecht Co. v. Bowles*, 321 U. S. 321 (1944). The Commission's Supplemental Application to the District Court below and the action of the District Court were on the basis of such a review proceeding and the District Court made its findings accordingly (R. 291a).

On the other hand, in a suit under Section 18(f), Drexel would have been entitled to a trial *de novo* of at least some of the issues before the District Court, as well as an opportunity to raise the question of whether the Court should itself determine, on a full weighing of the evidence, the reasonableness of the fee, a question which has never been authoritatively determined in a case where, as here, the agency is seeking injunctive relief. See *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U. S. 498 (1949); *SEC v. Okin*, 132 F. 2d 784 (2d Cir. 1943).

The Court's decision in the instant case, if permitted to stand, deprives Drexel of any opportunity ever to raise the issues which would have arisen in a suit against it under Section 18(f) without the Commission or any Court ever having made any findings on them. Drexel is thus deprived of substantial rights by the appellate nature of the instant proceeding, which has, until the decision of this Court, been regarded by all parties, including the Commission, as solely a proceeding to enforce a Section 11(e) plan.

WHEREFORE, Respondent Drexel & Co. respectfully petitions the Court

(1) to enter an order granting a rehearing in the above entitled proceeding, limited to the issues raised herein; and

(2) whether or not the petition for rehearing is granted, to revise the opinion of the Court or so phrase its mandate to the Court below as to make it clear that the jurisdiction of the Commission is limited, in accordance with Section 10(b)(2), to that portion of the Drexel fee "to be given, directly or indirectly, in connection with" the acquisition by Bond & Share of the stock of Middle South Utilities, Inc. and United Gas Corporation pursuant to Electric's Section 11(e) Plan.

Respectfully submitted,

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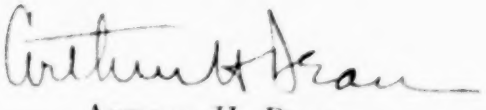
March 23, 1955.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.



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